Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–390 OF 2002

JAMES FOONG, LOW HOP BING AND SURIYADI JJCA

8 OCTOBER 2007

Labour Law — Domestic inquiry — Proceedings at inquiry — Allegation of lack of opportunity to cross examine witness — Whether decision of domestic inquiry inequitable

Labour Law — Industrial Court — Award — Fighting another employee within premises of employer in breach of employer's rules — Reference to common law meaning of 'misconduct' — Whether award flawed — Whether irrationality in award to warrant High Court to examine substance of decision

Labour Law — Industrial Court — Jurisdiction — Judicial review — Role of High Court — Whether court should treat judicial review as appeal from subordinate courts and exercise own discretion over facts of case

The respondent was at all material time an employee of the appellant. She was then 47 years of age and had been with the appellant for 11 years before she was dismissed on 6 July 1999. The reason for her dismissal was that she was found fighting with another employee which was her niece Julie on 15 June 1999 in the appellant's premises. Julie was also dismissed by the appellant. Before dismissing the respondent, the appellant held a domestic inquiry that found her in breach of the appellant's rules and regulations of employment and recommended her dismissal. Dissatisfied with this decision, the respondent made representation under s 20(3) of the Industrial Relations Act 1967 ('the Act') for reinstatement to her former position without loss of service and seniority with back wages, allowances, commissions, benefits and privileges, or, alternatively for loss of wages as compensation in lieu of reinstatement. This representation was eventually referred to the Industrial Court for an award. When the Industrial Court dismissed the respondent's representation, she applied to the High Court for judicial review seeking for an order of certiorari to quash the award of the Industrial Court. This was allowed with a direction that the matter be remitted back to the Industrial Court to consider the amount of compensation in lieu of reinstatement to be

paid to the respondent. The appellant, dissatisfied with this outcome, appealed.

Held, allowing the appeal:

(1) By referring to the common law meaning of 'misconduct', the Industrial Court was faulted by the High Court for applying common law principle rather than the 'statutory principle' which is s 20 of the Act. This view of the learned judicial commissioner was rather strange since in order to arrive at the decision of whether the respondent was dismissed without just and reasonable cause, the Industrial Court must first decide whether the act of the respondent amounted to a misconduct. It was only when the impugned act was not a misconduct that the respondent could be successful in her representation under s 20 of the Act. Thus, it was essential to ascertain what misconduct amounts to and to do so reference should be made to case law as well as reputable text whose opinions are mainly derived from principles enunciated from decided cases on this subject (see para 15).

(2) Having ascertained that misconduct includes an act of non disciplinary behaviour or an action inconsistent with an express or implied condition of an employee's service, the Industrial Court found that the respondent had indeed breached category III of the appellant's Rules and Regulations which prohibits 'fighting or striking another employee within the Companies premises', and if any employee is in breach of this condition, he or she would be 'liable to disciplinary action including suspension without pay and termination of employment with or without notice'. Here, the respondent was indeed involved in a fight with another employee of the appellant. It did not really matter who started the fight or whether she was provoked into it but the fact remained that she had breached the appellant's Rules and Regulations by fighting with another employee in the company's car park. Though the respondent had appealed to the appellant's management to be given another chance in view of her long service record, this was turned down when it was discovered that she had been previously warned by her supervisor not to repeat a similar sort of incident. Another reason why her appeal was rejected was because the appellant had a workforce of over 400 where discipline among the workers in the factory must be maintained. Based on these facts there was no irrationality in the Industrial Court award to warrant the High Court to examine the substance of the decision and even if it did, to return a different conclusion from that of the Industrial Court (see para 19).

(3) The learned judicial commissioner had criticized the approach adopted by domestic inquiry in failing to accord the respondent with an

opportunity to cross examine Julie's witnesses. This she said would amount to deprivation of natural justice. Section 30(5) of the Act states that, 'The Court shall act in according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form' when making an award. When this applies to Industrial Court's proceedings then more so it should be to domestic inquiry which, in this case, was set up to inquire into the incident, and as long as all parties were given an opportunity to present their case and their versions duly considered by the panel, then its finding cannot be said to be inequitable (see para 20).

(4) Since none of the exceptions applied in this case to warrant the High Court to venture further than to examine the judicial making process rather than the substance of the award, the learned judicial commissioner had erred in her approach in reviewing this award the way she did. She had erroneously approached the judicial review as if it was an appeal from the subordinate courts and had exercised her own discretion over the facts of the case which was preserved for the Chairman of the Industrial Court (see para 22).

[Bahasa Malaysia summary

Responden pada setiap masa matan adalah pekerja perayu. Beliau berumur 47 tahun dan telah bekerja dengan perayu selama 11 tahun sebelum beliau dipecat pada 6 Julai 1999. Sebab pemecatannya adalah kerana beliau didapati bergaduh dengan pekerja lain yang merupakan anak saudara Julie pada 15 Jun 1999 di premis perayu. Julie juga telah dipecat oleh perayu. Sebelum memecat responden, perayu telah mengadakan siasatan dalaman yang mendapati beliau telah melanggar peraturan-peraturan pekerjaan perayu dan menyarankan pemecatannya, Berasa tidak puas hati dengan keputusan ini, responden telah membuat representasi di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('Akta tersebut') untuk pengembalian kedudukan jawatan kepada jawatan asalnya tanpa kehilangan perkhidmatan dan kekananan dengan gaji tertunggak, elaun, komisen, faedah dan keistimewaan, atau secara alternatif untuk kehilangan upah sebagai pampasan menggantikan pengembalian kedudukan jawatan. Representasi ini akhirnya dirujuk kepada Mahkamah Perusahaan untuk satu award. Apabila Mahkamah Perusahaan menolak representasi responden, beliau telah memohon kepada Mahkamah Tinggi untuk semakan kehakiman memohon satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan. Ini telah dibenarkan dengan arahan agar perkara ini dikembalikan ke Mahkamah Perusahaan untuk menimbangkan jumlah pampasan menggantikan pengembalian kedudukan jawatan untuk dibayar kepada

responden. Perayu, berasa tidak puas hati dengan keputusan ini, telah merayu. A

Diputuskan, membenarkan rayuan tersebut: B

(1) Dengan merujuk kepada maksud 'misconduct' dalam common law, Mahkamah Tinggi terkhilaf terhadap Mahkamah Perusahaan kerana menggunakan prinsip common law dan bukan 'statutory principle' iaitu s 20 Akta tersebut. Pendapat pesuruhjaya kehakiman ini agak pelik kerana bagi tujuan untuk tiba kepada keputusan sama ada responden telah dipecat tanpa sebab yang adil dan munasabah, Mahkamah Perusahaan terlebih dahulu hendaklah memutuskan sama ada tindakan responden membentuk salah laku. Hanya jika tindakan yang dipersoalkan itu bukan suatu salah laku maka responden berjaya dalam representasinya di bawah s 20 Akta tersebut. Oleh itu, adalah penting untuk memastikan apakah salah laku yang terbentuk dan untuk berbuat sedemikian rujukan hendaklah berdasarkan undang-undang kes dan juga teks berdasarkan reputasi baik yang mana pendapat-pendapat tersebut terutamanya adalah berasal daripada prinsip-prinsip yang dinyatakan dalam kes-kes yang diputuskan berhubung perkara ini (lihat perenggan 15). C D E

(2) Setelah menentukan bahawa salah laku termasuklah suatu tindakan yang melibatkan kelakuan tanpa disiplin atau suatu tindakan yang tidak konsisten dengan syarat nyata atau tersirat berhubung perkhidmatan pekerja, Mahkamah Perusahaan mendapati bahawa responden sememangnya telah melanggar kategori III Kaedah dan Peraturan perayu yang melarang 'fighting or striking another employee within the Companies premises', dan jika mana-mana pekerja telah melanggar syarat ini, beliau adalah 'liable to disciplinary action including suspension without pay and termination of employment with or without notice'. Di sini, responden sememangnya terlibat dalam satu pergaduhan dengan pekerja perayu. Ia tidak penting siapa yang memulakan pergaduhan itu atau sama ada beliau dibangkitkan kemarahannya tetapi hakikatnya beliau masih telah melanggar Kaedah dan Peraturan perayu kerana bergaduh dengan pekerja l;ain di tempat letak kereta syarikat. Meskipun responden telah merayu kepada pengurusan perayu untuk diberi satu peluang lagi dengan mengambilkira rekod perkhidmatan lama beliau, ianya ditolak kerana didapati bahawa beliau sebelum ini telah diberi amaran oleh penyelianya untuk tidak mengulangi kejadian sebegini. Salah satu sebab kenapa rayuan beliau ditolak adalah kerana perayu mempunyai tenaga kerja lebih 400 orang di mana disiplin di kalangan pekerja-pekerja dalam kilang hendaklah dikekalkan. Berdasarkan fakta-fakta tersebut F G H I

tiada keadaan yang tidak rasional dalam award Mahkamah Perusahaan untuk mewajarkan Mahkamah Tinggi memeriksa asas keputusan dan jikapun begitu, untuk tiba kepada satu keputusan berbeza daripada Mahkamah Perusahaan (lihat perenggan 19).

(3) Pesuruhjaya kehakiman yang bijaksana telah mengkritik pendekatan yang digunakan oleh siasatan dalaman kerana gagal untuk memberikan responden peluang untuk memeriksa balas saksi-saksi Julie. Ini katanya membentuk tidak mendapat hak asasi. Seksyen 30(5) Akta tersebut menyatakan bahawa, 'The Court shall act in according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form' apabila membuat award. Apabila ini digunakan kepada prosiding Mahkamah Perusahaan maka ia patut juga begitu untuk siasatan dalaman yang mana, dalam kes ini, telah ditubuhkan untuk menyiasat kejadian tersebut, dan selagi semua pihak telah diberikan peluang untuk mengemukakan kes mereka dan versi mereka setelah dipertimbangkan oleh ahli panel, maka penemuannya tidak boleh dikatakan tidak saksama (lihat perenggan 20).

(4) Memandangkan tiada pengecualian digunakan dalam kes ini untuk mewajarkan Mahkamah Tinggi untuk terus memeriksa proses membuat keputusan dan bukan asas award, pesuruhjaya kehakiman yang bijaksana telah terkhilaf dalam pendekatannya semasa mengkaji semula award ini sebagaimana beliau telah lakukan. Beliau terkhilaf dengan menggunakan semakan kehakiman seperti ianya satu rayuan daripada mahkamah bawahan dan telah menggunakan budi bicaranya ke atas fakta-fakta kes yang dikawal oleh Pengerusi Mahkamah Perusahaan (lihat perenggan 22).]

Notes

For a case on proceedings at inquiry, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 830.

For cases on Industrial Court award, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1351–1411.

For cases on Industrial Court jurisdiction, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1454–1517.

Cases referred to

Bumiputra Commerce Bank Bhd v Mahkamah Perusahaan Malaysia & Anor [2004] 7 MLJ 441 (refd)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141 (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417 (refd)

Menara Panglobal Sdn Bhd v. Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493 (refd)

Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik [2002] 2 MLJ 27 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Legislation referred to
Industrial Relations Act 1967 s 20(3)

Appeal from: Judicial Review No 25–20 of 2001 (High Court Ipoh)

Yee Seu Kai (V Modeshanantham with him) (Yee Nantham Leong & Partners) for the appellant.
Kuthiah Arunasalam (Ku & Partners) for the respondents.

James Foong JCA (delivering judgment fo the court):

INTRODUCTION

[1] We heard this appeal on 23 January 2007, and unanimously dismissed it with costs. We now give our reasons. Before we do so, the following are the brief facts of the case.

FACTS

[2] The respondent was at all material time an employee of the appellant. She was then 47 years of age and had been with the appellant for 11 years before she was dismissed on 6 July 1999. The reason for her dismissal was that she was found fighting with another employee of the appellant on 15 June 1999 in the appellant's premises. This other employee was none other than her own niece, Julie, who was then 17 years of age. Julie was also dismissed by the appellant. Before dismissing the respondent, the appellant held a domestic inquiry that found her in breach of the appellant's rules and regulations of employment and recommended her dismissal. Dissatisfied with this decision, the respondent made representation under s 20(3) of the Industrial Relations Act 1967 ('the Act') for reinstatement to her former position without loss of service and seniority with back wages, allowances, commissions, benefits and privileges, or, alternatively for loss of wages as compensation in lieu of reinstatement. This representation was eventually referred to the Industrial Court for an award. When the Industrial Court dismissed the respondent's representation, she applied to the High Court for judicial review seeking for an order of certiorari to quash the award of the Industrial Court. This was allowed with a direction that the matter be remitted back to the Industrial Court to consider the amount of

compensation in lieu of reinstatement to be paid to the respondent. The appellant, dissatisfied with this outcome, appealed to us.

OUR REASONS

[3] We approach this appeal by first examining whether the learned Judicial Commissioner had applied the correct principle of law in conducting the judicial review. It is well established in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 that:

[4] Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing abuse of power, be itself guilty of usurping power

[5] This approach was adopted by the Supreme Court in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 where Jemuri Serjan SCJ (as he then was) said (at p 419):

> It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition...

[6] (and at p 421)

> On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute 'de novo' and decide it on its merits

[7] This approach was once again repeated by us in *Menara Panglobal Sdn Bhd v. Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493 where Mohd Ghazali Yusoff JCA advised (at p 511):

> From the authorities discussed above, I would think that in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:
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> i judicial review is not an appeal from a decision but a review of the manner in which the decision was made;
>
> ii the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;

iii the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

iv the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;

v the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;

vi the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

[8] However, there are now certain limited exceptions where the review extends to substance of the decision and not just the judicial making process. This can be observed from the judgment of Edgar Joseph Jr FCJ in Federal Court decision of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 where, in our view, covers situations where there is either illegality, irrationality and perhaps proportionality. Illegality concerns whether the authority or body whose decision is being impugned has kept within the parameters of its powers. Irrationality is where a decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. And proportionality is in this example cited 'there are cases in the United Kingdom which point to the conclusion that even where EEC law is not applicable, such a principle has been recognized as a general principle of English law, and when applied, it enables the court to review an impugned decision for substance as well as process'.

[9] In allowing the order for certiorari in this instant case, the learned judicial commissioner first accused the Industrial Court of applying common law principles in arriving at the award 'instead of the statutory principles contained in s 20 of the Act'. Then, she dwelled in-depth into the evidence

adduced in the Industrial Court particularly extracts from the domestic inquiry and came to a conclusion that there is no positive evidence to implicate the respondent as the person who started the fight with Julie. From there, she proceeded to find that no opportunity was accorded to the respondent to cross examine Julie during the domestic inquiry, and the Industrial Court had just accepted the evidence of the appellant and the notes taken at the domestic inquiry to come to a decision. She then accused the Industrial Court for holding that it was upon the respondent to call as her witness, one Maliga, a production line leader in her sector in the factory, to fortify her claim that before the incident the respondent had reported to Maliga that Julie was provoking her. In conclusion, the learned judicial commissioner said that 'in view of the large number of workers employed by the employer to wit, 420, and the serious injuries which were suffered by both the applicant and Julie, which caused both of them to faint and the applicant to be hospitalized for two days, the court felt that the reinstatement of the applicant was not appropriate despite her long service of 11 years. In the premises, the court ordered that the matter be remitted back to the IC to consider the amount of compensation in lieu of reinstatement to be paid to the applicant'. To justify her decision in evaluating the substance of the decision of the Industrial Court, the learned judicial commissioner cited *R Rama Chandran v The Industrial Court of Malaysia & Anor*.

[10] Before we consider whether the learned judicial commissioner was qualified to review the substance of the Industrial Court award, let us first examine whether there was judicial impropriety in the judicial making process of the Industrial Court in coming to the award.

[11] At the hearing in the Industrial Court, witnesses for the appellant as well as the respondent were called. They were cross-examined. The notes taken at the domestic inquiry were also admitted and following *Bumiputra Commerce Bank Bhd v Mahkamah Perusahaan Malaysia & Anor* [2004] 7 MLJ 441 'where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a prima facie case against the employee'. Adopting this approach we find that the Industrial Court had not erred in holding that it was the duty of the respondent to call her witness, Maliga. From our observation of the proceedings conducted in the Industrial Court we detected no impropriety in the judicial making process.

[12] Now we shall deal with the issue of whether the High Court can proceed to examine the substance of the Industrial Court's decision. To enter into this arena, the High Court must be satisfied that the case falls within the stated exceptions enumerated in *R Rama Chandran v The Industrial Court of Malaysia & Anor*.

[13] First we look at illegality ie whether the Industrial Court had kept strictly within the parameters of its powers. We find no evidence that the Industrial Court had over step its jurisdiction in this instant case and neither did the High Court make any accusation of this either. Second, is irrationality, where the award is so outrageous in defiance of logic or of accepted moral standard that no sensible person who has applied his mind to the question could have arrived at such a decision.

[14] The first consideration for this must be whether the Industrial Court has applied the right principle of law. As the issue before the Industrial Court concerned an allegation of an employee in breach of a term and condition in her contract of employment due to misconduct it is, in our view, pertinent that the Industrial Court must first determine the meaning of misconduct. To ascertain this, the learned Chairman of the Industrial Court referred to certain decided cases as well as *Halsbury's Laws of Malaysia*, Vol 7, at pp 120.090–120.0921 which says:

> 'misconduct' connotes to conduct that is inconsistent with the fulfilment of the express or implied conditions of service. Some examples of types of misconduct are, wilfully disobeying lawful and reasonable orders or precedents,... unprofessional conduct and breach of company policy, using violence on superior or co-employee

[15] By referring to this, he is faulted by the High Court for applying common law principle rather than the 'statutory principle' which is s 20 of the Act. We find this view of the learned judicial commissioner rather strange since in order to arrive at the decision of whether the respondent was dismissed without just and reasonable cause, the Industrial Court must first decide whether the act of the respondent amounts to a misconduct. It is only when the impugned act is not a misconduct that the respondent can be successful in her representation under s 20 of the Act. Thus, it is essential to ascertain what misconduct amounts to and to do so reference should be made to case law as well as reputable text whose opinions are mainly derived from principles enunciated from decided cases on this subject. In fact such approach was approved by the Federal Court in *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27 where at p 36 Ahmad Fairuz FCJ (as he then was) declared:

> And the appeal now before us, as in *Wong Chee Hong*, is one that pertains to s 20 IRA. As such we see nothing wrong in applying the common law principles to the issue of dismissal in the appeal now before us. That is what, after all, the Supreme Court did in *Wong Chee Hong*.

[16] And prior to this at p 35 he said:

> In *Wong Chee Hong*, the Supreme Court pointed out that s 20 IRA is entirely different from para (c) of s 55(2) of the United Kingdom Protection of Employment Act 1978. Hence the Supreme Court, at p 95 of the report said:
>
> > ... Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word 'dismissal' in our s 20. We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle.

[17] From above, we are of the view that the Chairman of the Industrial Court had applied the correct principle of law in this case.

[18] Now onto the Industrial Court's appreciation of the facts. Was it so perverse that the award handed down is so outrageous that it defies logic or accepted moral standards in the sense that no sensible person who had applied his mind to the question to be decided could have arrived at it?

[19] Having ascertained that misconduct includes an act of non disciplinary behaviour or an action inconsistent with an express or implied condition of an employee's service, the Industrial Court found that the respondent had indeed breached category III of the appellant's Rules and Regulations which prohibits 'fighting or striking another employee within the companies premises', and if any employee is in breach of this condition, he or she would be 'liable to disciplinary action including suspension without pay and termination of employment with or without notice'. Here, the respondent was indeed involved in a fight with another employee of the appellant. It does not really matter who started the fight or whether she was provoked into it but the fact remains that she had breached the appellant's Rules and Regulations by fighting with another employee in the company's car park. Though the respondent had appealed to the appellant's management to be given another chance in view of her long service record, this was turned down when it was discovered that she had been previously warned by her supervisor not to repeat a similar sort of incident. Another reason why her appeal was rejected was because the appellant has a workforce of over 400 where discipline among the workers in the factory must be maintained. Based on these facts we do not detect any irrationality in the Industrial Court award to warrant the High Court to examine the substance of the decision and even if it did, to return a different conclusion from that of the Industrial Court.

[20] The learned judicial commissioner had criticized the approach adopted by domestic inquiry in failing to accord the respondent with an

opportunity to cross examine Julie's witnesses. This she said would amount to deprivation of natural justice. But let us be reminded that under s 30(5) of the Act, "The Court shall act in according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form" when making an award. When this applies to Industrial Court's proceedings then more so it should be to domestic inquiry which, in this case, was set up to inquire into the incident, and as long as all parties were given an opportunity to present their case and their versions duly considered by the panel then its finding cannot be said to be inequitable.

[21] As for the third exception of proportionality we do not find the facts of this case fit the example illustrated. This exception therefore does not apply.

[22] Since none of the exceptions applies in this case to warrant the High Court to venture further than to examine the judicial making process rather than the substance of the award, we find that the learned judicial commissioner had erred in her approach in reviewing this award the way she did. She had erroneously approached the judicial review as if it was an appeal from the subordinate courts and had exercised her own discretion over the facts of the case which is preserved for the Chairman of the Industrial Court.

Conclusion

[23] It was for the reasons stated above that we allowed the appeal with costs to the appellant here and below.

Appeal allowed.

Reported by Loo Lai Mee